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**Marine Conservation  
Alliance**

# Fax

TO: TOM B. ✓

Rollie

to Andy L. **To:** Rolland A. Schmitten**From:** Ron Clarke**Fax:** (301) 713-1043**Pages:** Eight (8), including this cover**Phone:** (301) 713-2325, ext. 101**Date:** August 12, 2004**Re:** DSC Petition**CC:**☐ **Urgent**☐ **For Review**☐ **Please Comment**☐ **Please Reply**☐ **Please Recycle**

Hi Rollie,

As per my e-mail, I inadvertently addressed and sent this to Secretary Evans. Here's a hard copy for you. Sorry for any confusion.



Ron Clarke, Executive Director



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but the Agency and the Council have risen to the task, by developing an EFH analysis incorporating the best scientific information available. Oceana's emergency rule-making petition would simply exacerbate that problem, pulling the best government and private scientists away from completion of the court-ordered process, and requiring them to focus on the proposals in the petition. If Oceana truly wants the best outcome to protect essential fish habitat, it should continue to work with other stakeholders and decision-makers in the Council and NMFS to apply strong science to these important decisions.

Several environmental groups, including Oceana, have challenged EFH actions and decisions in federal courts around the country, and have consistently failed. No court has made a finding that any Council or NMFS has failed to comply with the MSA's EFH provisions. Oceana has now attempted another avenue by requesting emergency rule-making by the Department of Commerce. Abandoning the transparent public process mandated by the MSA, Oceana is striving to force action in a closed forum with little or no stakeholder input other than by Oceana itself. It is difficult to believe this is an effort to achieve the best result for managed species and their habitat rather than an anarchic ploy to portray the regulators as unresponsive.

## **II. Analysis of EFH Is Scientifically Challenging and Requires More Research.**

NMFS, the Alaska Department of Fish and Game, the Council's Scientific and Statistical Committee (SSC), and the Council have applied the best scientific information available in making decisions in the EFH and HAPC processes. However, significant information gaps exist and must be filled through new research activity as soon as possible. At best, existing scientific literature contains only modest information on determining the dependence of managed species on marine habitat. Most benthic habitat in the North Pacific remains unmapped. With specific regard to corals, the MCA supports mapping of corals in the Aleutian Islands and has repeatedly expressed that support to the NPFMC and others. In response, the agency has scheduled a number of submersible dives in the Aleutian Island region this summer for the express purpose of identifying areas of high coral concentrations.

Although some managed species are seen near certain habitats on a regular basis, there is little available research to 1) demonstrate whether those managed species are dependent on the specific habitat, and 2) determine the methods of dependence. Taking the next step to determine that the dependence is "essential" is fraught with the possibilities of misconception and incorrect assumptions. The MSA also requires determining whether there are adverse effects on that habitat from fishing. Research can demonstrate some effect on certain types of bottom habitat from various fishing gears, but little research exists to make decisions on whether it is adverse to the managed species. The connections from 1) managed species to 2) demonstrated dependence on habitat features to 3) physical impacts of fishing on those habitat features to 4) adverse effects are difficult to determine with the present state of scientific knowledge. But the MSA is clear: each of those connections must be made for a Council to act, and those connection decisions must be based on the best scientific information available.

Oceana asserts (p. 4 of its petition) "We [Oceana] have sufficient data and information about certain areas...to designate and protect the areas immediately." Leaving aside for the moment the legal



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concept that it is the Government's judgment that counts, not Oceana's, the bold assertion is not supported by facts and data. Oceana, because of its inadequate information, uses assumptions and a loose interpretation of the MSA and its regulations to support its demand for immediate action. For example, on p. 2, it asserts that HAPC identification is required by the MSA, while HAPCs are never mentioned in the statute, and are, in fact, not required by any statute. Again, on p. 11, Oceana asserts that pollock, cod, flatfish and other species are "...commonly found around sea squirts..." and "associated with red tree coral..." and therefore that the sea squirt and coral areas are "necessary to support a sustainable fishery..." Oceana doesn't even suggest a possible mechanism to demonstrate those species' dependence on the habitat, or attempt to explain that pollock and cod are found throughout the Bering Sea, most frequently over mud or sand bottom, areas where sea squirts and corals are not typically found. On p. 13, Oceana says that "...destruction of deep-sea coral and sponge communities may alter [emphasis added] the ecosystems..." and that "...damage to the *Primnoa* communities may affect [emphasis added] the populations of associated species..." but provides no basis for those possibilities.

Oceana's petition states many times, in several different ways, that managed species have been observed near coral and sponge areas in the North Pacific. That is the evidence upon which the petition depends – nothing more. Undeterred, Oceana morphs these assertions into hard legal conclusions that coral and sponge habitat is necessary and essential to the managed species. The respected, experienced scientists working in the North Pacific do not accept assertions without evidence. The seasoned decision-makers in the Council and NMFS do not accept assertions without hard evidence. Consequently, Council and NMFS decisions are being made on the best scientific information available—nothing more, nothing less.

### III. NMFS Is the Scientific Expert Agency and Must Use Its Best Scientific Judgment and Discretion.

Extensive federal case law under the Administrative Procedures Act, and under the MSA, has consistently held that a federal regulatory agency has extensive discretion in making regulatory decisions, overturning agency actions only if they are arbitrary and capricious. That is particularly evident in litigation under the Endangered Species Act in which courts have given even stronger deference to the exercise of scientific judgment by agencies with scientific expertise. In the past few years, federal courts in New England have upheld the exercise of discretion by NMFS in challenges by environmental groups to decisions made regarding EFH.

In two cases dealing with the East Coast Tilefish Fishery Management Plan, two federal courts made important findings. In the first such case, *Natural Resources Defense Council v. Evans* (F. Supp. 2d S.D.N.Y.), Judge Berman found, in deciding whether to impose measures to mitigate possible adverse impacts from fishing, "...reliance on the best available scientific evidence is sufficient," and that NMFS had no obligation to impose mitigation measures in the absence of evidence demonstrating adverse impacts from fishing. In the second case, *HADAJA, Inc. v. Evans* (2003 WL 21190990 (D.R.I.)), Judge Smith held that Councils are not obligated to impose mitigation measures when the alleged adverse effects are based on inference, speculation, or surmise. In fact, that court held

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mitigation measures based on inference, speculation, or surmise were in violation of National Standard No. 2 of the MSA.

NMFS is actively exercising scientific judgment in dealing with EFH and HAPCs in the North Pacific and has been making such decisions frequently over the last five years. Oceana wants to toss that enlightened work aside in favor of an emergency decision with no stakeholder input other than its own. In fact, Oceana asserts in its petition that the Secretary has no discretion and no choice but to implement its proposal. On the basis of unsupported conjecture, speculation, and surmise, Oceana wants a decision made behind a closed door with public admittance barred.

**IV. The Ongoing Council and NMFS Process Is the Best Approach for Protecting EFH, Not Emergency Action.**

The Draft Environmental Impact Statement (DEIS) on EFH, released in January 2004, lists over thirty NMFS contributors in addition to five outside contractors, fourteen members of the NPFMC's SSC, twenty-one members of the NPFMC's Advisory Panel, several Council staff, and the Council itself in the North Pacific. Public comment at meetings of the Council's EFH Committee, the SSC, AP, and Council was extraordinarily extensive over the course of the last several years. The DEIS lists 44 pages of literature citations with many thousands of pages of data, research, and analysis. The Council process has been thoughtful, deliberative, and open, with all of the proposals on the table for support, opposition, criticism, and analysis. In contrast, Oceana does not indicate who prepared the petition or did the scientific research and analysis, and lists only a handful of literature citations. Most of the literature relates to the occurrence of deep-sea corals, not to the issue of fish habitat. The literature citations contain no documents on the practicability of proposed regulations or the economic impacts on fishermen, processors, and communities.

The DEIS deals with all aspects of the EFH mandate in the MSA, including a broad suite of alternatives for mitigation, which are analyzed both for efficacy in protecting habitat and practicability for the affected industry and communities. It looks at long- and short-term costs and benefits of mitigation measures to EFH, the fisheries, and the nation. In short, the Council/NMFS process is correctly addressing the entire scope of EFH requirements, as well as the HAPC process agreed to by the litigants.

Oceana prefers a less deliberative, open process, and requests the Secretary immediately impose stringent regulations related to deep-sea corals and sponges. Oceana argues that because deep-sea corals and sponges have been little known until now, it is impossible to use the normal transparent process to make useful decisions. However, Oceana, other environmental organizations, and NMFS have placed corals and sponges squarely in the EFH process in the North Pacific. Within the last three months, Oceana, the Ocean Conservancy, the MCA, and NMFS all nominated as HAPCs several coral concentrations in the Aleutian Islands, to protect the very corals Oceana is desperate to cover with emergency regulations. The proposals are strikingly similar and the Council forwarded them for full analysis. The results of that analysis will provide the core information necessary for responsible decision-making on corals and sponges. Oceana doesn't want to rely on that analysis; but the MCA believes you can and should, and urges you to do so.

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The National Oceanic and Atmospheric Administration (NOAA) policy guidelines for emergency regulations under the MSA clearly limit such action to extremely urgent and special circumstances where substantial harm will be caused during the time required to conduct normal rule-making. 62 FR 44421, 8/21/97. Controversial actions with serious economic consequences, except under extraordinary circumstances, should be carried out through the normal process. The Secretary must have an administrative record justifying the emergency action and demonstrating compliance with the SFA's National Standards. The criteria define an emergency as resulting from recently discovered circumstances that present serious conservation problems, with immediate benefits that outweigh the value of the normal, transparent public process. Although the guidance is expressed in only a page-and-a-half, the intent could not be more clearly stated by the use of terms such as "extraordinary," "extremely," "substantial damage," and "unforeseen." Congress and NOAA intended the open public process to be the rule in almost all cases, with emergency action used only in extremely limited circumstances.

Oceana's justification is stated on p. 1 of its March 24, 2004 petition, "Ongoing efforts to designate essential fish habitat (EFH) are proceeding so slowly that without immediate protection, many of these sensitive habitats will suffer irreparable harm." Only two months earlier, on January 10, 2004, Oceana submitted HAPC proposals to the NPFMC dealing with corals in the Aleutian Islands, stating "We look forward to continuing our discussion of HAPCs and Essential Fish Habitat with you in the coming months." We find no legitimate or apparent reason why Oceana, on the one hand, was working in the public process while preparing an emergency petition on the other.

The Oceana petition uses the first twenty-three of twenty-nine pages to argue for designating coral and sponge habitat as EFH and HAPC, with all of the bootstrap arguments discussed above. The three pages that discuss the emergency authority are mostly reassertions of the flawed assumptions stated in the first part of the petition:

- Oceana asserts deep-sea corals are such recent discoveries they cannot be protected in the current process, although Oceana has offered proposals in the ongoing process in the North Pacific for the last three years. The protection of corals was certainly not "unforeseen" by Oceana in the North Pacific.
- Oceana asserts the current Council process is too slow, but that process was stipulated in court at the request of and agreement by Oceana and other environmental group plaintiffs.
- Oceana asserts (in two short paragraphs) there is a serious conservation problem for deep-sea corals, but provides no evidence to support that claim.
- Oceana asserts the benefits of emergency action outweigh the costs, but provides no estimate, assertion, evidence, assumption, or analysis regarding possible costs. None.
- Oceana includes no assertions, discussion, or analysis of whether the National Standards are met, even though those are clear requirements for emergency action.



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In sum, Oceana has not even tried to meet the requirements for emergency action laid out in the NOAA policy guidelines.

V. **Economic Impacts Must Be Measured As Part of the EFH Process.**

The MSA requires Councils and NMFS to impose conservation and management measures to minimize adverse effects to habitat from fishing, but only "to the extent practicable". Congress intended the practicability test to be a limitation on the duty of the Councils and NMFS to mitigate adverse effects. The EFH regulations require consideration of both long- and short-term costs and benefits to the habitat, the fisheries, and the nation, consistent with National Standard 7. The NOAA policy guidelines on the use of the emergency authority in the MSA clearly state the benefits must outweigh the costs -- thus requiring an analysis of benefits and costs -- and must be consistent with the National Standards. National Standard 7 requires costs be minimized when enacting any conservation and management measures under the MSA.

The ongoing work on EFH and HAPCs in the NPFMC includes some information and analysis on the potential economic costs to the fishing industry of the proposed management measures. The MCA has commented on that issue numerous times, both before the Council and in written submissions to the Council. The careful consideration of potential costs to the industry and communities is an important feature of management under the MSA and the National Standards.

Several federal courts have addressed possible management measures under EFH and have found that the evidence of benefits must be hard, not speculative, and that management measures cannot be imposed without that evidence and analysis of both benefits and costs. In addition, the First Circuit Court of Appeals has held that "practicable" does not mean "possible," and that NMFS should apply its expertise and discretion in determining how to manage the fisheries. Management measures must be economically practicable when weighed against benefits. See, *Conservation Law Foundation and Oceana v. Donald L. Evans*, U.S. Court of Appeals for the First Circuit, 2004 U.S. App. Lexis 3665.

Oceana, in a brief two-page discussion in the petition, simply asserts the requested protective measures are "practicable (p. 19)," would impose costs that are "minimal (p. 19)," and would result in "little costs (p. 20)." Oceana offers no evidence, data, or analysis on potential economic costs or practicability, but notes closures have occurred in other countries as its sole justification, again with no scientific information on costs or benefits. Finally, Oceana cites the First Circuit case noted in the paragraph above, but makes no effort to dispute its decision.

In sum, Oceana makes no effort to meet the requirements of the MSA to consider economic costs of the proposed measures. On this basis alone, the Secretary should dismiss the petition as unresponsive to the requirements of the MSA, the NOAA emergency rule-making policy, and NMFS regulations.

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VI. Conclusion.

The EFH mandate added to the MSA in 1996 presents the most challenging charge to the Councils and NMFS since the enactment of the original Act in 1976. The scientific analysis of marine habitat, its use by managed fish species, the degree of dependence of those species on the habitat, the effect of impacts from fishing, and, most importantly, the integration of those concepts, are on the frontiers of marine science. The outcomes of Councils' actions along the coasts of the United States will be significant determining factors on the future sustainability of our fisheries.

The magnitude of the consequences of these actions directs the Councils and NMFS to careful decision-making, using the MSA-required best scientific information available. Hasty, precipitous action through the use of extraordinary emergency authority is uncalled for and fraught with risk.

We urge you to dismiss the petition and apply the necessary resources to completion of the transparent public process mandated by the MSA.

Sincerely yours,



Ronald G. Clarke  
Executive Director